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Supreme Court, U.S.
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No. 95-1305

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

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GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

V.

RONALD P. REED,
Respondent,

----------§----------

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THAT THE PROCEDURAL RULE RELIED UPON BY TEXAS COURT OF APPEALS IN REFUSING TO REACH BATSON CLAIM ON GROUND THAT DEFENDANT FAILED TO PROVIDE COMPLETE VOIR DIRE TRANSCRIPT WAS NOT ADEQUATE TO SUPPORT COURTS' JUDGMENT AND PRECLUDE FEDERAL HABEAS REVIEW OF BATSON CLAIM ON GROUND OF PROCEDURAL DEFAULT, WHERE RULE WAS NOT FIRMLY ESTABLISHED AT TIME IT WAS APPLIED; RATHER, COURT OF APPEALS DECISION WAS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE DEFENDANT FAILED TO PROVIDE COMPLETE VOIR DIRE TRANSCRIPT?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES RONALD P. REED, RESPONDENT, PROCEEDING PRO SE, HEREINAFTER REFERRED TO AS RESPONDENT REED, AND FILES THIS BRIEF FOR THE RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE

IN 1986 RESPONDENT REED WAS CONVICTED IN DALLAS TEXAS STATE COURT OF AGGRAVATED SEXUAL ASSAULT AND SENTENCED TO LIFE IN PRISON. RESPONDENT REEDS' CONVICTION WAS AFFIRMED ON DIRECT APPEAL. REED v. STATE, 751 S.W. 2d 607 (Tex. App. --Dallas 1988, no pet.) IN AFFIRMING THE CONVICTION THE COURT OF APPEALS DECLINED TO REACH THE MERITS OF THE BATSON CLAIM BECAUSE RESPONDENT REED FAILED TO PROVIDE A COMPLETE TRANSCRIPT OF THE VOIR DIRE EXAMINATION. THE COURT OF APPELS BASED ITS CONCLUSION ON THE "WELL SETTLED [rule] THAT COMPLAINTS AS TO VOIR DIRE ERROR CANNOT BE REVIEWED IN THE ABSENCE OF A TRANSCRIPTION OF THE COMPLETE VOIR DIRE EXAMINATION." A COMPLETE TRANSCRIPTION OF THE VOIR DIRE EXAMINATION DOES NOT EXIST BECAUSE RESPONDENT REEDS' COUNSEL INFORMED THE TRIAL COURT THAT HE DID NOT DESIRE THE COURT REPORTER TO MAKE SUCH A RECORD. THE QUESTIONING OF SOME PANEL MEMBERS, HOWEVER, WAS RECORDED AND THERE IS A TRANSCRIPT OF THE BATSON HEARING. RESPONDENT REED DID NOT FILE A PETITION FOR DISCRETIONARY REVIEW BY THE COURT OF CRIMINAL APPEALS BUT, RATHER, FILED A STATE PETITION FOR THE WRIT OF HABEAS CORPUS IN ACCORDANCE WITH TEX. CODE CRIM. PROC. ANN. ART. 11.07, ALLEGING THE BATSON CLAIM. THE COURT OF CRIMINAL APPEALS DENIED THE PETITION WITHOUT WRITTEN ORDER. HAVING FULLY EXHAUSTED HIS STATE REMEDIES, RESPONDENT REED FILED THE INSTANT PETITION FOR THE WRIT OF HABEAS CORPUS ADVANCING THE BATSON CLAIM.

THE PETITION WAS REFERRED TO A MAGISTRATE JUDGE WHO ISSUED A REPORT AND RECOMMENDATION CONCLUDING THAT THE PETITION SHOULD BE DENIED BECAUSE RESPONDENT REED PROCEDURALLY DEFAULTED ON THE BATSON CLAIM. THE DISTRICT COURT ADOPTED THE REPORT AND RECOMMENDATION AND DENIED THE PETITION. RESPONDENT REED FILED A MOTION FOR CPC WHICH WAS GRANTED BY THE FIFTH CIRCUIT. ON APPEAL THE FIFTH CIRCUIT REVERSED AND REMANDED FOR CONSIDERATION OF THE MERITS OF THE BATSON CLAIM. THE FIFTH CIRCUIT FOUND THAT THE STATE COURTS' INVOCATION OF A PROCEDURAL BAR WAS NOT ENTITLED TO THE RESPECT OF A FEDERAL HABEAS COURT BECAUSE IT WAS NOT "FIRMLY ESTABLISHED AND REGULARLY FOLLOWED" AT THE TIME IT WAS APPLIED.

REASONS FOR DENYING THE WRIT

THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT STATE PROCEDURAL RULE RELIED ON BY THE COURT OF APPELS IN REED IS INADEQUATE. ALL OF THE CIRCUIT COURTS, INCLUDING THE FIFTH CIRCUIT, AGREE THAT A STATE PROCEDURAL RULE IS ADEQUATE ONLY IF IT WAS FIRMLY ESTABLISHED AT THE TIME IT WAS APPLIED. FORD v. GEORGIA, 498 U.S. 411, 11 S.Ct. 850, 112 L.Ed.2d 935 (1991)... MOREOVER, IT MUST BE "STRICTLY OR REGULARLY FOLLOWED BY THE COGNIZANT STATE COURT...[and] STRICTLY OR REGULARLY APPLIED **evenhandedly to the vast majority of similar claims.**" AMOS v. SCOTT, 61 F.3d 333 at 339 (emphasis in original), (5th Cir. 1995)

IN ADDITION, THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT REED IS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT.

AS SUCH, THE COURT OF APPEALS' REFUSAL TO REACH REEDS' BATSON CLAIM DUE TO HIS FAILURE TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT "DOES NOT EVEN REMOTELY SATISFY THE REQUIREMENT... THAT AN ADEQUATE AND INDEPENDENT STATE PROCEDURAL BAR TO THE ENTERTAINMENT OF CONSTITUTIONAL CLAIMS MUST HAVE BEEN 'FIRMLY ESTABLISHED OR REGULARLY FOLLOWED' BY THE TIME" IT WAS APPLIED. REED v. SCOTT, 70 F.3d 844 (5th Cir. 1995), FORD v. GEORGIA, 498 U.S. at 424, 11 S.Ct. at 857-58.

REVIEW IS UNWARRANTED BECAUSE THE DECISION OF THE FIFTH CIRCUIT COURT WAS CORRECT. IT DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR ANY CIRCUIT COURT OF APPEALS...

A. THE SWAIN, CASES, SWAIN v. ALABAMA, 380 U.S. 202 (1965), USED AS AUTHORITY BY THE PETITIONER ARE DISTINGUISHABLE [ie. do not apply], TO BATSON CLAIM WHERE THERE IS ADDITIONAL RECORDS AVAILABLE TO THE COURTS FOR REVIEW, SUCH AS, THE BATSON HEARING TRANSCRIPT WHICH CAN PROVIDE A "SUFFICIENTLY COMPLETE RECORD TO DEMONSTRATE ERROR", THUS PROVIDING A CLEAR BREAK FROM THE PAST...

SPECIFICLY, IN REESE v. STATE, 481 S.W.2d 841,842 (Tex. Crim. App. 1972), THE COURT REFUSED REVIEW OF A SWAIN CLAIM BECAUSE "[t]he VOIR DIRE EXAMINATION OF THE JURY PANEL IS NOT INCLUDED IN THE RECORD NOR DOES THE RECORD REFLECT A REQUEST THAT SUCH VOIR DIRE EXAMINATION BE TAKEN BY THE COURT REPORTER." IN HARRIS v. STATE, 656 S.W.2d 481,486 (Tex. Crim. App. 1983) (REFUSING TO REACH MERITS OF CLAIM THAT BLACKS WERE IMPROPERLY EXCLUDED FROM JURY BECAUSE DEFENDANTS' BRIEF WAS INADEQUATE AND BECAUSE "THE RECORD CONTAINS NO INDICIA IN ANY FORM OF THE RACIAL COMPOSITION OF THE JURY"): GAINES v. STATE, 479 S.W.2d 678, 679 (Tex. Crim. App. 1972) (REFUSING REVIEW OF SIMILAR CLAIM BECAUSE "[t]here IS NOTHING IN THE RECORD, NEITHER BY INCLUSION OF THE JURY SELECTION LIST SHOWING THE PEREMPTORY CHALLENGES NOR BY A FORMAL BILL OF EXCEPTIONS OR BY ANY OTHER METHOD TO SUSTAIN THIS CONTENTION"); DAVIS v. STATE, 478 S.W.2d 958,959 (Tex. Crim. App. 1972) (REFUSING REVIEW OF SIMILAR CLAIM BECAUSE "[t]he RECORD WAS NOT DEVELOPED ON THIS GROUND OF ERROR AND NOTHING IS PRESENTED FOR REVIEW").

THE CASES RELIED UPON BY PETITIONER DO NOT CONTROL THE RESOLUTION OF THIS MATTER BECAUSE THE COURT MUST FOCUS ON THE APPLICATION OF THE BAR IN THE CONTEXT OF A BATSON CLAIM. IN ORDER TO DETERMINE THE ADEQUACY OF A PROCEDURAL BAR THE COURT MUST EMPHASIZE THE APPLICATION OF THE BAR TO THE SPECIFIC CONSTITUTIONAL CLAIM AT ISSUE. AMOS v. SCOTT, 61 F.2d 333 see also ANDREWS v. DELAND, 943 F.2d 1162, 1190 (10th Cir. 1991)

B. THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT REED IS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT.

THE PETITIONER ASSERTS THAT THIS IS NOT THE CASE, THAT SOME FIVE MONTHS BEFORE REED IN MCKINNEY v. STATE, 744 S.W.2d. 252,256 (Tex. App.--Waco 1987, no pet.) THE APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT. A CLOSE EXAMINATION OF THIS CASE USED AS AUTHORTY BY THE PETITIONER REVEALS THAT: "IN MCKINNEY THE APPELLATE RECORD DOES NOT CONTAIN A LIST OF THE PROSPECTIVE JURORS, ANY PERSONAL-HISTORY SHEETS FILLED OUT BY THE JURORS, PRIOR TO VOIR DIRE, OR A LIST OF THE PARTIES STRIKES. FURTHERMORE, THE TRANSCRIPTION OF VOIR DIRE DOES NOT REFLECT THE NUMBERS ASSIGNED TO MEMBERS OF THE PANEL, THEIR RACE OR SUFFICIENT PERSONAL INFORMATION ABOUT THE JURORS QUESTIONED THAT WOULD BE ESSENTIAL TO REVIEW THE RULING ON APPELLANTS' OBJECTION".

THE RESPONDENT REED HAS PROVIDED TO THE COURT [a]11 EACH AND EVERY PORTION OF THE RECORD THAT MCKINNEY WAS UNABLE TO INCLUDE IN THE RECORD ON APPEAL. NAMELY: LIST OF THE PROSPECTIVE JURORS, PERSONAL-HISTORY SHEETS, LIST OF THE PARTIES STRIKES, AND THE TRANSCRIPTION OF VOIR DIRE REFLECTING THE NUMBERS ASSIGNED TO MEMBERS OF THE PANEL, THEIR RACE OR SUFFICIENT PERSONAL INFORMATION ABOUT THE JURORS QUESTIONED THAT WOULD BE ESSENTIAL TO REVIEW THE RULING ON OBJECTION. SEE (HEARING ON MOTIONS INDIVIDUAL QUESTIONS OF VOIR DIRE VOLUME II OF V VOLUMES, p.93, thru p.102) SEE ALSO (STATEMENT OF FACTS VOL. I OF V HEARING UNDER THE STANDARDS OF BATSON p.7-9), SEE ALSO (JUROR INFORMATION CARDS DEFENSE EXHIBITS (A), AND (B) FROM THE BATSON HEARING).

TEXAS LAW PRECLUDES REVIEW OF AN ALLEGED VOIR DIRE ERROR IF THE DEFENDANT FAILS TO PROVIDE A SUFFICIENT RECORD FROM WHICH THE COURT MAY DISCERN SUCH ERROR RATHER THAN ABSOLUTELY PRECLUDING REVIEW OF AN ALLEGED VOIR DIRE ERROR ABSENT A COMPLETE TRANSCRIPTION OF THE VOIR DIRE EXAMINATION. MCKINNEY WAS UNABLE TO PROVIDE THE COURTS WITH A RECORD "SUFFICIENTLY COMPLETE TO DEMONSTRATE ERROR". RESPONDENT REED HAS PROVIDED THE COURTS WITH ALL THE INTEGRAL COMPONENTS OF A BATSON CLAIM AS A MATTER OF SUBSTANTIAL FEDERAL LAW. HEARING ON MOTIONS INDIVIDUAL QUESTIONS OF VOIR DIRE, QUESTIONING OF SOME PANEL MEMBERS, AND THE TRANSCRIPT OF THE BATSON HEARING.

THUS PROVIDING THE COURT WITH A RECORD THAT IS "SUFFICIENTLY COMPLETE TO DEMONSTRATE ERROR". Tex. R. App. Proc. 50(d) FURTHER CONTENTING THAT RESPONDENT REED IS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT...

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CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

RESPECTFULLY SUBMITTED,

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